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IN THE
Supreme Court of the United States
October Term, 1942.

IN THE MATTER

OF

The Application of JOSEPH E. LEVINE,
a Bankrupt,
Petitioner-Appellant,

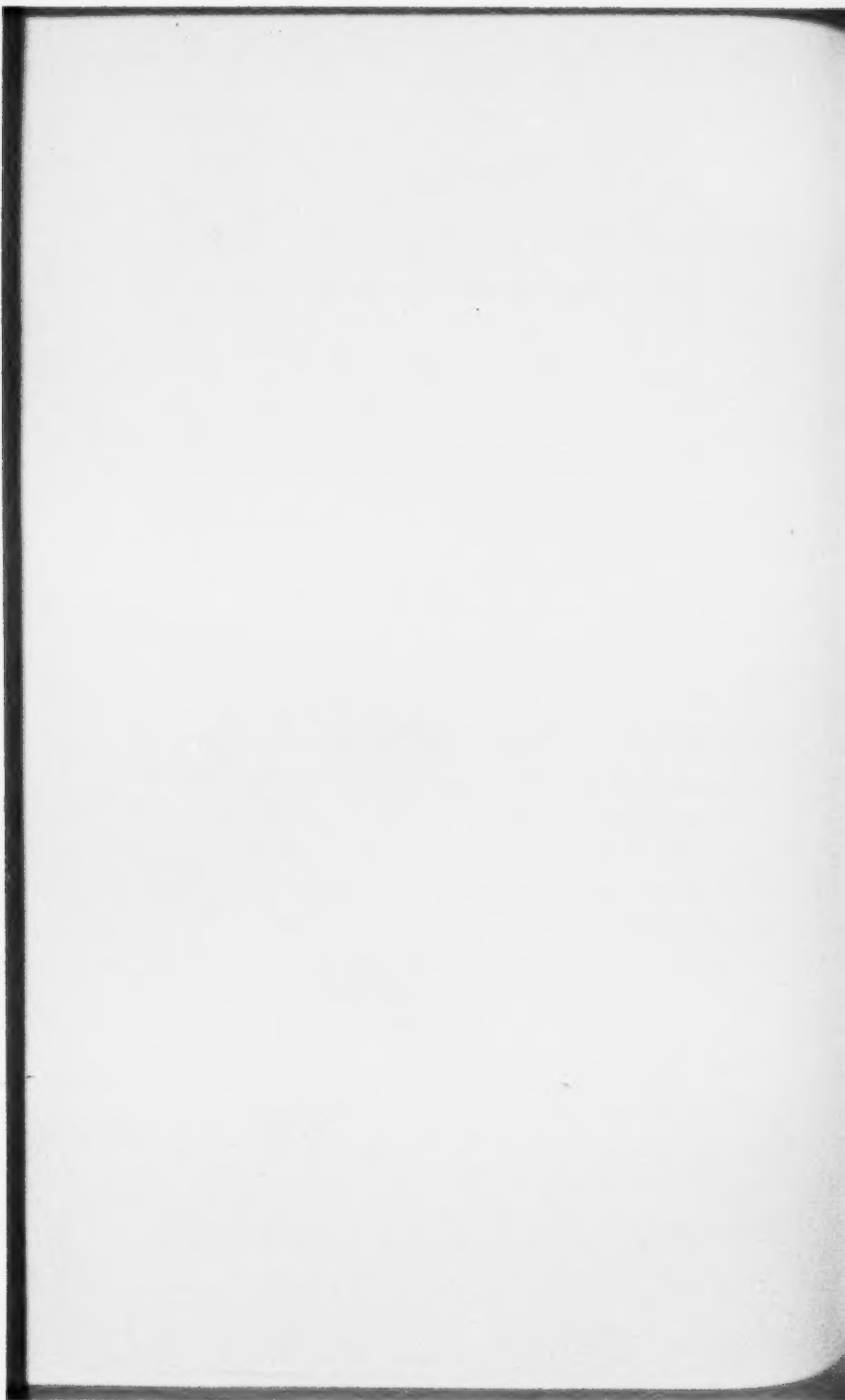
To Have a Certain Judgment in Favor of
JACK LEVINE,
Respondent,
Cancelled of Record.

**Petition for a Writ of Certiorari to the
Supreme Court of the State of New
York, for the County of Kings.**

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Of Counsel.



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*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

JOSEPH E. LEVINE, your petitioner, respectfully represents:

1. By this petition opportunity is sought to review a final order of the Supreme Court of the State of New York, County of Kings, dated October 10, 1941, entered in the office of the Clerk of the County of Kings on the same day, which order was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department by an order dated March 23, 1942, from which order leave to appeal to the Court of Appeals of the State of New York was denied by said Court of Appeals by an order dated June 11th, 1942.

The order of the Supreme Court of the State of New York, County of Kings, dated October 10, 1941 (fol. 18-18) denied a motion made by your petitioner for an order

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pursuant to Section 150 of the New York Debtor and Creditor Law to discharge and cancel of record a certain judgment in the sum of \$14,149.00, docketed with the Clerk of the County of Kings on January 3rd, 1940, in favor of respondent.

2. These, briefly, are the facts:

Over a period of years your petitioner received substantial sums of money from respondent, a younger brother (Exhibit A, fol. ~~494~~⁴⁹⁵), which he was to invest without any requirement that these funds be segregated in any special account or manner (Exhibit A, fol. ~~444~~⁴⁴⁵). Unfortunately, with the advent of the severe depression in 1929-31, petitioner was unable to repay the money he owed respondent. At all times the money due respondent was deemed a mere debt and treated as such. Petitioner annually credited respondent with interest on the aggregate debt at the rate of six per centum per annum (Exhibit A, fol. ~~498~~⁴⁹⁹).

Subsequently at the suggestion of respondent, petitioner willingly and in an evident desire to repay his obligation to his younger brother, executed and delivered to respondent a conditional confession of judgment (Exhibit A, fols. ~~657-660~~⁶⁵⁷⁻⁶⁶⁰) based upon the moneys so received (Exhibit A, fol. ~~537~~⁵³⁸). On January 3rd, 1940, without cause or justification and in open violation of the agreement under which the confession was delivered, the respondent entered judgment upon the said confession (Exhibit A, fols. ~~548-550~~⁵⁴⁸⁻⁵⁵⁰).

Attempts were made for an amicable adjustment of the debt, but were unsuccessful.

On February 26th, 1940, petitioner filed a petition in bankruptcy in the United States District Court for the Eastern District of New York (Exhibit A, fol. ~~550~~⁵⁵¹). The said judgment was duly scheduled by your petitioner as one of his debts. Your petitioner received his discharge in bankruptcy on April 22nd, 1940 (Exhibit A, fol. ~~64~~⁶⁵).

Respondent, though duly notified, did not appear and made no objection in the bankruptcy proceedings to petitioner's discharge.

Subsequently respondent, by the service of a subpoena, commenced a proceeding supplementary to judgment to enforce its payment (Exhibit A, ~~fols. 77-79, 84-88~~^{fols. 12, 27, 28, 30}). Petitioner there moved to vacate said process on the ground that the judgment upon which jurisdiction of the subject matter depended, had been discharged in bankruptcy (Exhibit A, ~~fols. 51-54~~^{fols. 57, 58}). This motion, after a hearing and report by a Referee, was denied by the Justice of the New York Supreme Court presiding at Special Term, Part I. The learned Justice held that a trust had been violated by non-payment and the judgment consequently was not dischargeable in bankruptcy. The Court based its determination on its construction of subdivision 4, Section 17, Title 11, U. S. Code.

On appeal to the Appellate Division, the Special Term ruling was upheld on the entirely different ground that the petitioner had willfully injured respondent's property. This determination was based on the Court's interpretation of sub. 2, Section 17, Title 11, U. S. Code.

More than one year later petitioner commenced this proceeding to cancel the said judgment pursuant to Section 150 of the Debtor and Creditor Law of the State of New York.

In opposition to this motion respondent urged only one objection, that is, that the order on the prior motion to vacate the subpoena in supplementary proceedings was *res adjudicata* on the issue of dischargeability of the said judgment.

Question Presented.

The Appellate Division, in affirming the order denying petitioner's motion to vacate the subpoena in supplementary proceedings said in part:

“The proof clearly shows that there was a willful and malicious conversion of the judgment-creditor’s property by the judgment-debtor so that the judgment by confession entered for such conversion was not a debt dischargeable in bankruptcy under Subdivision 2 of Section 17 of the Bankruptcy Act . . .”

It is contended, and this honorable Court is respectfully requested to examine the record of the preceding motion (Exhibit A) for the sole purpose of ascertaining the veracity of the appellant’s contention, that the opinion of the Appellate Division on the preceding motion to the effect that the appellant’s conduct did result in willful and malicious injury to respondent’s property was entirely without foundation or basis in fact. Not only that but whatever facts were then before the Court clearly demonstrated, that the appellant’s conduct did not result in a willful and malicious injury to the respondent’s property of such nature as to render the within application not dischargeable in bankruptcy.

The entire record, therefore, raises this question: Whether Subdivision 2 of Section 17 of the Bankruptcy Act, which prohibits the discharge of any obligation resulting from “willful and malicious” injury to the personal property of another is satisfied by proof of anything less than larceny or theft, deliberately and maliciously conceived and executed?

Such proof cannot be found in this record.

Reasons for Granting the Writ.

It is asserted in the accompanying brief that the decision in this case is inconsistent with the holding of this Court in *Davis v. Aetna Acceptance Co.*, 293 U. S. 328. Furthermore, *MacIntyre v. Kavanaugh*, 242 U. S. 138 is not inconsistent with that case and does not support the decision below.

But petitioner is not before this Court solely because he is personally aggrieved by the erroneous application of the Bankruptcy Act by the State Courts. The decision of the State Courts herein creates a conflict of authority as to whether mere failure to repay a debt constitutes a willful and malicious injury to property under Section 17, Subdivision 2 of the Bankruptcy Act. This Court ought exercise its jurisdiction to settle this conflict.

WHEREFORE, your petitioner prays that this Honorable Court review the final order of the New York Supreme Court denying his motion for cancellation of a judgment discharged in bankruptcy.

Dated: New York, N. Y., August 20, 1942.

JOSEPH E. LEVINE,
Petitioner.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK. }

JOSEPH E. LEVINE, being duly sworn, deposes and says that he is the petitioner in the within proceeding and that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH E. LEVINE.

Sworn to before me this }
20th day of August, 1942. }

RUTH FLAX,
Notary Public,
Bronx County,

Bronx Co. Clk's No. 163, Reg. No. 153F44;

Certificates filed in

N. Y. Co. Clk's No. 870, Reg. No. 4F487;

Kings Co. Clk's No. 166, Reg. No. 4285;

Commission expires March 30, 1944.